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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ETHAN A., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

KRISTEN V.,

Defendant and Appellant.

D066041

(Super. Ct. No. J517970)

APPEAL from an order of the Superior Court of San Diego County, Carol
Isackson, Judge. Affirmed.

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and
Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County
Counsel, and Georgia A. Gebhardt, Deputy County Counsel, for Plaintiff and
Respondent.

Kristen V. appeals a juvenile court order denying her petition for modification (Welf. & Inst. Code, § 388)¹ to obtain custody of her son, Ethan A., on the eve of the permanency planning hearing (§ 366.26) and nearly two years after her reunification services were terminated. She contends the court abused its discretion by finding she did not meet her burden of showing changed circumstances and that placement with her would be in his best interests. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Kristen, and the presumed father, Stewart A.,² have extensive histories of drug abuse and drug-related arrests. When Ethan was born in 2009, he tested positive for methadone. The parents participated in voluntary services, but the case was closed when they moved to Arizona.

In November 2010, the San Diego County Health and Human Services Agency (the Agency) filed a petition on Ethan's behalf under section 300, subdivision (b). The petition alleged Stewart was arrested after attempting to trade Percocet for heroin, while Kristen and Ethan were in the vehicle. Kristen had Percocet in her purse without a prescription. At the detention hearing, the court placed Ethan at Polinsky Children's Center.

At the December 2010 jurisdiction and disposition hearing, the court sustained the petition and declared Ethan a dependent child. The court removed Ethan from Stewart's

¹ All further statutory references are to the Welfare and Institutions Code.

² Stewart is not involved in this appeal.

custody, but placed him with Kristen on the condition she stay at the paternal grandmother's home.

In April 2011, the Agency filed a supplemental petition and the court removed Ethan from Kristen's custody because of noncompliance with her drug treatment program. She twice gave an insufficient sample to be tested, she twice refused to be tested, and she once tested positive for amphetamines. Further, she left the paternal grandmother's home with Ethan for several days. The court placed Ethan in foster care.

Kristen was ordered to attend dependency drug court, but she was terminated for noncompliance in May 2011. She entered KIVA, an inpatient drug treatment program, but she was terminated in August 2011 after testing positive for controlled substances. She attempted to enter another residential drug treatment program in November 2011, but she tested positive and admitted extensive heroin use. She entered a detox program, but "walked away." She failed to complete a parenting program and she visited Ethan only once in two months.

The six-month review hearing was not held until January 2012, at which time the parents had received services for more than a year. The court found both parents had made some progress on their case plans. Kristen was in a residential treatment program and had begun individual therapy. The court continued Ethan in foster care and ordered Kristen to report for drug court screening.

The contested 12-month review hearing was held in July 2012. Kristen did not attend. The court found she had not made substantive progress with her case plan and terminated her services. She had been ordered into dependency drug court for the second

time, but failed to attend the first hearing and was terminated. She was also discharged from a residential treatment program because she failed to return. She again entered detox, and again left. She was out of contact with the social worker, and she had not visited Ethan for about six months. The court found Stewart had made substantial progress and placed Ethan with him.

In February 2013, Kristen tested positive for heroin, amphetamines, methamphetamines, and morphine. She failed to drug test in April and May 2013 and her contact with the Agency was intermittent. In May she was arrested for theft, providing a false identification to peace officers, and public intoxication.

In May 2013, the Agency filed a supplemental petition for the removal of Ethan from Stewart's custody. The petition alleged Stewart tested positive for marijuana and heroin, and had visible track marks on his arm from intravenous drug use. At the detention hearing, the court placed Ethan in foster care, but gave the Agency the discretion to place him with the paternal grandmother on the condition Stewart not live there.

In June 2013, Kristen failed to drug test. In July she was arrested for possession of narcotics and drug paraphernalia, disorderly conduct, and theft. She had not visited Ethan since November 2012. After termination of her services in July 2012, she "saw him twice and then stopped attending."

In July 2013, the court sustained the supplemental petition and placed Ethan with the paternal grandmother. It found Stewart had not made substantial progress with his

case plan and terminated his services. The court scheduled a permanency planning hearing (§ 366.26) for November 2013.

In September 2013, Kristen had a drug relapse. In November 2013, Kristen gave birth to a daughter. The baby, like Ethan, tested positive for methadone. The Agency did not remove the baby from parental custody, and provided Kristen with a voluntary case plan. She was living with the baby's father, who was initially dishonest with the Agency about his drug history, which included criminal convictions for the possession and sale of controlled substances.

The section 366.26 hearing was continued to April 2014, when the court continued it again to allow Kristen to file a petition under section 388 for custody of Ethan. In February 2014, she had contacted the Agency to request visitation with Ethan, after not seeing him for more than a year, and there were a few visits between March and May. At the initial visit, Ethan did not know Kristen. He began to have fun with her, but easily separated from her at the end of visits.

Kristen's petition argued Ethan should be returned to her because her circumstances had changed since July 2012, when the court terminated her services. She was participating in substance abuse treatment and had negative drug tests, her daughter had not been removed from her care, she had resumed a consistent visitation schedule with Ethan and visits went well, and placement with her would give Ethan an opportunity to have a relationship with his half sister.

On May 9, 2014, the court held a combined section 388 and section 366.26 hearing. Kristen submitted a copy of the Agency's "Delivered Service Log" for her

voluntary case for her daughter, and a letter verifying Kristen's participation in the ParentCare Perinatal Case Management program and stating "[s]he has been working on" maintaining sobriety.

Kristen also submitted her stipulated testimony that she was currently attending ParentCare; she had been sober since October 1, 2013; she continued to use methadone because in the past when she tried to go off of it she relapsed, and she wanted "a safe, slow titration to prevent relapse"; she was on step 2 of a 12-step program and she had a sponsor; and she had in-home parenting education. As to visitation, she explained: "I didn't visit Ethan for a long-time [*sic*] because I was not in the right frame of mind. I didn't want him to see me messed up. I didn't want our visits to upset him. I wanted us to be able to have good visits and to get my act together."

Additionally, Kristen submitted stipulated testimony by her counselor at ParentCare. The counselor stated her "progress has been wonderful and [she] remains sober, very open and honest. She meets once a month with her social worker, care coordinator, and me and she has made great strides and positive changes since starting the program." The program allowed Kristen to continue methadone because she "was a high risk case due to her newborn child." Further, Kristen submitted stipulated testimony of a social worker that Kristen participated in all voluntary case plan services for her daughter and the projected close date for that case was June 2014.

The Agency opposed the petition on the ground Kristen has an extensive history of drug abuse and truncated treatment, and "she is still in the early stages of her journey

towards sobriety." Ethan's counsel also opposed the petition.³ The court denied the petition, finding Kristen did not meet her burden of showing changed circumstances or that placement with her would be in Ethan's best interests.

The court proceeded to the section 366.26 matter. The Agency described Ethan as "energetic and happy," and adoptable because he had no medical, developmental, or emotional issues. He was bonded to the paternal grandmother, and she wanted to adopt him. Further, there were 45 potential adoptive homes in San Diego County for a child with his characteristics. The court found by clear and convincing evidence that Ethan was likely to be adopted within a reasonable time, and none of the exceptions to the adoption preference applied. The court terminated parental rights and selected adoption as the preferred permanent plan.

DISCUSSION

I

Kristen contends the court erred by denying her section 388 petition. "The essence of a section 388 petition is the petitioner's assertion that she or he can demonstrate, by a preponderance of the evidence, that new evidence or a change of circumstances exists warranting a finding that the best interests of the minor child will be served if a previous order of the court is changed, modified or set aside. The petition is addressed to the dependency court's discretion and in an appeal from the order on the petition, the task of the reviewing court is to determine whether that discretion has been abused." (*In re Marcos G.* (2010) 182 Cal.App.4th 369, 382.) " ' "The appropriate test

³ On appeal, Ethan's counsel agrees with the Agency's position.

for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." ' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

"Not every change in circumstance can justify modification of a prior order. The change in circumstances must relate to the purpose of the order and be such that modification of the prior order is appropriate." (*In re S.R.* (2009) 173 Cal.App.4th 864, 870.) The petitioner must show changed circumstances, not changing circumstances. (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) "The change of circumstances or new evidence 'must be of such significant nature that it requires a setting aside or modification of the challenged prior order.' " (*In re Mickel O.*, at p. 615.)

II

We conclude the evidence amply supports the court's ruling, and thus there is no abuse of discretion. The court reasonably found Kristen's circumstances were changing, but not changed. The court explained, "This is particularly true given the long history here . . . of substance abuse and treatment and periods of sobriety and capable functioning followed by substance abuse and dysfunctional functioning." After termination of services in July 2012, she had been in her current treatment for only approximately four months immediately preceding the May 2014 hearing. The court noted Kristen had a relapse in September 2013.

Further, the court explained, "I can find virtually no evidence to support the allegation that it would be in Ethan's best interest to be placed with [Kristen]. [¶] The evidence is undisputed that he is clearly bonded to his current caregiver, relies on her as his parent. . . . He's been with the grandmother a couple of times, but has been with her continuously since May 24th, 2013. He's been with her since he was three years and nine months. He's . . . going to be five in August." The court added: " . . . Ethan is a child who needs permanence. This is not a child who has briefly been removed from the [m]other . . . so that a strong argument can be made that he's got a strong bond with his [m]other, that he's relied on his [m]other" The court noted that when Kristen finally began visiting Ethan after a lengthy absence, he did not recognize her and "had to begin to learn who his [m]other is." The court refused to "disrupt [Ethan] yet again."

The court gave a cogent and thoughtful explanation for its ruling, and a different outcome would have been surprising and unmerited. (See *In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 47-48 [parents' sobriety for a few months after a lengthy history of drug abuse presented changing, not changed, circumstances]; *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [no showing of changed circumstances when parents had extensive drug abuse histories and "recent efforts at rehabilitation were only three months old"]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform."].) Like the mother in *Casey D.*, Kristen was " 'attempting to get her life together' but had not established changed circumstances, and had failed to demonstrate an ability to maintain a sober lifestyle." (*In re Casey D.*, at p. 45.)

Kristen's principal contention is that since the Agency left her helpless infant daughter in her care, "it is illogical to conclude [she] had not changed enough to care for Ethan who was . . . nearing five years of age at the time of the hearing." In Ethan's dependency case, however, the wisdom of leaving the daughter in Kristen's care was not before the court. Further, the new child added to Kristen's stress, as evidenced by the stipulated testimony of the ParentCare counselor, who explained Kristen "was a *high risk case due to her newborn child* and [thus] it was agreed upon by all parties that the slow titration off of [m]ethadone was very appropriate." (Italics added.) This is not the type of changed circumstance that would justify Ethan's removal from a stable home. Considering all the relevant factors, the court's ruling does not exceed the bounds of reason.⁴

DISPOSITION

The order is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.

⁴ Given our holding, it is unnecessary for us to address Kristen's contention the court abused its discretion by finding she did not show placement with her would serve Ethan's best interests. We would, however, find against her on that point as well. As the court explained, she presented virtually no evidence on the issue. Ethan suffered considerable disruption with several placements, and he was entitled to permanence and stability.